SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR.

No.

75-1070

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN ROBERT HAY,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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NO. _____

IN THE
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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE
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THE TENTH CIRCUIT

Petitioner, John Robert Hay, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause on December 31, 1975, "United States of America, Plaintiff-Appellee, v. John Robert Hay, Defendant-Appellant".

OPINIONS OF THE COURTS BELOW

The United States District Court for the District of Colorado entered an opinion in the within matter on April 30, 1974,

reported in 376 F. Supp. 264 which is appended hereto as Appendix A.

The opinion of the United States Court of Appeals, Tenth Circuit, against which this Petition is pursued was entered on December 31, 1975, and has not yet been published. It is appended hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on December 31, 1975, as captioned above.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Was Petitioner denied his Sixth Amendment right to a speedy trial under the following facts?

Petitioner was indicted in August of 1972, and was arrested in May of 1973. He was arraigned on June 1, 1973, and his case set for trial on July 16, 1973. He was prepared to go to trial at this time, but on motion of the prosecution the July date was vacated and the case was not re-set. In November of 1973, Petitioner filed a "Demand for Trial or Dismissal". This was denied, and no trial date was set. On December 21, 1973, he filed for dismissal on the speedy trial issue. This also was denied. On that same date, and

after denial of motion, he again asked for a trial date. As a result of this request, trial was set for April 15, 1974. In March, 1974, the government moved for a continuance of the April date, and this, too, was granted over Petitioner's objection. A new trial date of June 10, 1974, was then given. In May, 1974, the prosecution moved for a continuance of the June date until after September 16, 1974. Petitioner also vigorously objected to this continuance, but it was granted. Trial did not commence until October 15, 1974. Thus, from indictment to trial was a period of 26 months, and a period of 17 months from arraignment to trial.

Both the trial court and the United States Court of Appeals acknowledged that Petitioner had been prejudiced by these delays.

B. The prosecution failed to prove the crime of conspiracy to defraud the United States. The matter involves an alleged fraudulent claim filed in reference to the rehabilitation of the Saigon, Viet Nam Metropolitan Water System, which was financed, up to a point, by a loan from the United States to the Government of Viet Nam. Payment of the claim was made from sources other than the United States loan, since the United States had loaned its maximum amount. However, before the claim was to be paid, the United States advised Viet Nam to have an audit conducted. While the United States paid the cost of the audit, it was not involved in payment of any amounts shown to be due by the audit. No evidence was presented

to indicate that the audit, in which the defendant participated, was not conducted properly, nor that any amounts paid to the claimant as a result of the audit were in any manner incorrect, or based on false or fraudulent documents. Since the United States was not a party to the audit nor affected by the outcome of it, there could not have been a crime committed against the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI, provides:

> "Rights of accused.--In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

STATUTE INVOLVED

18 U.S.C. §371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the first instance is the charge of a violation of 18 U.S.C. §371, "Conspiracy to...defraud United States", quoted above.

The indictment charged that the purposes of the conspiracy were to defraud the United States in its functions of:

a. Lending money to foreign governments (emphasis added);

b. To have the services of

Petitioner, owing a particular duty to the United States, performed in a free and untrammeled manner.

A. Relevant facts relating to the Speedy Trial Issue:

Petitioner was indicted on August 18, 1972, at which time he was employed as an engineer on a United States Agency for International Development (hereinafter A.I.D.) project in Mali. He did not know that he had been indicted and continued working there until the United States took him into custody in Mali in May, 1973, and returned him to Denver, Colorado.

On June 1, 1973, he entered a "Not Guilty" plea to the charge and was released on a bond secured by both a $5,000 cash deposit and real property owned by his family in Colorado Springs, Colorado. The bond required him to surrender any passports that he had, ordered that he could not leave Colorado, that he must report to the magistrate in Colorado Springs twice a month. Petitioner had undergone surgery for cancer and required frequent medical check-ups for the disease.

Trial was set for July 16, 1973. The government moved to vacate this trial date on the grounds that it could not proceed to take a deposition in Switzerland by July 16th, that it could not go to trial without the deposition. Petitioner stated to the Court that he was ready to proceed on the July 16th date. The government's motion was heard and granted on

July 5, 1973, though no new trial date was set. However, the government represented that the arrangements could be made within thirty to forty-five days to take the deposition.

Petitioner, prior to the July 5th date, had filed pre-trial motions, and the government, at about the same time, filed a motion for a Commission to allow the taking of the deposition. Since the July 16th trial date had been vacated, both the government's motion and the Petitioner's pre-trial motions were heard on August 23, 1973. Petitioner's motions were denied and the government's motion was granted, but no trial date set.

In the intervening time between August 23, 1973, and November 14, 1973, since nothing further had occurred, Petitioner filed a "Demand for Trial or Dismissal" wherein he demanded either that he be promptly tried or the case against him dismissed. Hearing was held on this on November 30, 1973. The case was neither set for trial at this time, nor was it dismissed, but rather the Court gave the government ten days to inform the Court when the deposition would be taken. The government at this time still had no firm arrangements with the Swiss government to allow the taking of the deposition.

On December 21, 1973, commitments still not firm, Petitioner again moved for a dismissal on the grounds that he had not even been given a trial date, let alone a speedy trial. This motion was

denied, and the deposition was set for January 29, 1974. Petitioner at the December 21st hearing again demanded a trial date, as a result of which trial was set for April 15, 1974.

Some time after the deposition had been taken, trouble arose over the deponent's refusal to sign it, so that it was several months later before it was finally returned, unsigned, to the United States.

In March of 1974, Petitioner filed a "Second Supplemental Motion to Dismiss for Lack of Speedy Trial". This was denied, the April 15th trial date was vacated, over Petitioner's objection, and reset for June 10, 1974.

On May 2, 1974, the government filed a "Motion to Change the Trial Date from June 10, 1974, until On or About September 16, 1974". The basis of this motion was that a "key prosecution witness", a Mrs. Lang, was pregnant, and could not make the flight from Saigon to Denver. The government represented to the Court that without her testimony it would not "be fruitful in going forward to trial* * * ". Petitioner, to no avail, strenuously objected to this further continuance. The Court then found that if Petitioner would agree to proceed by deposing the witness in Saigon, the case could be tried in August of 1974, otherwise after September 15. Petitioner declined this offer, in that by so doing he would be forced to trade his right of confrontation for a speedier trial. Fur-

ther, by this time, all American troops had withdrawn from Viet Nam, and Saigon was in a state of siege, so that it would have been foolhardy to voluntarily place one's self in real danger of death or injury by agreeing to go to Saigon. Since the use of a deposition was not acceptable, the Court then asked for an agreement on a trial date around September 16, 1974. The precise date of September 16th conflicted with Petitioner's attorney's schedule, but the attorney agreed to October 1, 1974. In any event, the case was set for trial and was tried beginning October 15, 1974.

After Mrs. Lang's testimony the trial court ruled that her testimony was not essential to the government's case, and stated in the record that:

> "Had I known what your case was, I would never have granted the continuance for Mrs. Lang's pregnancy. I relied on your representation she was essential to your case, and it's apparent to me she was not, and the defendant is entitled to that in the record from me.
>
> * * *
>
> I am very upset by this case. I had been told, as I mentioned earlier, that this case had to be continued. And that this man's Sixth Amendment rights had to be more or less ignored. Well, they didn't.

If I'd known then what I know now, you gentlemen would have a better record in the Court of Appeals. You've got a bad one now, and you'd better be thinking about how you're going to make a record somewhere, out of the presence of the jury, of course, to justify the delay from June 10th until October, where defendant was crying loud and long for his Sixth Amendment rights to a speedy trial. Because the record you made in getting this continuance has not been very well supported by the testimony in this case, and constitutional rights are more important than the right of the government to put the frosting on the cake by one more witness.

And at this point I'm afraid Mrs. Lang was just one more witness. I don't think she was essential to this case and yet that was the reason that I granted the continuance because I was told that the government would probably have to dismiss if she was not available. No way would you have had to dismiss gentlemen. You could have gotten this case to the jury with or without her.

So you'd better be thinking a lot about how you're going to make some sort of record you can defend in an appellate court because they aren't going to be in a position of having been led down the primrose path. They are going to have the testimony before them. And I doubt that they reach the same conclusion I did, that the continuance was essential It's a very distressing thing.

* * *

Mr. Almon, I don't want to unduly interfere, but I would suggest -- and I'll tell you now I'm not going to grant it -- but I would suggest for the sake of the record you renew your motion to dismiss on Sixth Amendment grounds. I would suggest that you protect your record every inch of the way because I have heretofore expressed my views.

I have heretofore said that if I knew last June what I know now, I would never had continued the case, and when the Court of Appeals looks at this case with the awareness I have of what the real facts are, I think they may take a different view of the Sixth Amendment problems

than I took.

> I can only say that at the time I exercised my discretion, acting in complete reliance on the representation made to me that Mrs. Lang was absolutely essential to the government's case and it is manifest that she was not.

Both the trial court and appellate court acknowledged that Petition had suffered prejudice from the delays. His freedom was restrained. He was unable to get employment. He was living under anxiety and concern during the seventeen months from arraignment to trial.

B. Relevant facts relating to the issue of Failure to Prove a Crime against the United States:

In 1960, an agency of the United States, the Agency for International Development (hereinafter called A.I.D.), entered into an agreement with the government of South Viet Nam to loan money to that government to finance a new water system for Saigon.

Viet Nam established an entity known as the Saigon Metropolitan Water Authority (hereinafter called S.M.W.A.) as an agency for handling the project.

S.M.W.A. hired Hydrotechnic, a private American engineering firm, to oversee the entire project. S.M.W.A. also hired a

French firm known as Eiffel to manufacture and install the pipe used in the water system.

During most of the work, lasting many years, Petitioner was an engineer employed by Hydrotechnic in Viet Nam.

In late 1966 and part of 1967, as the work neared completion, Eiffel asserted certain claims against S.M.W.A. for additional payments plus the balance of its retention. A.I.D. had, by this time, loaned all of the funds it had available and would not loan any money for payment of Eiffel's claim. However, A.I.D. advised S.M.W.A. to have the Eiffel claim audited before S.M.W.A. paid it. As a result of this advice, S.M.W.A. hired auditors to audit the claim and hired Hydrotechnic to supply engineers, including Petitioner, to assist the auditors. The function of the engineers, when called upon to do so by the auditors, was to aid in determining whether or not certain materials, equipment, and workmen had been used on the job.

The testimony of the auditors was that the audit was a searching and thorough audit and that 95% of the invoices were verified back against the bank statements, and other documentation, such as customs' records.

The only participation by the United States was that it agreed to pay the cost of the audit, and to approve the agreement between the auditors and the Vietnamese government. The audit was

specifically governed by the laws of Viet Nam.

No evidence was offered that the audit was not properly conducted nor that payment made by the Vietnamese government of the Eiffel claim was not proper.

The facts, therefore, were that Hydrotechnic was an employee of not the United States but Viet Nam, and Petitioner was an employee of Hydrotechnic.

The United States was not a contracting party to the audit, nor a participant in it, had no control over it, nor was it affected monetarily or otherwise by the outcome of it.

REASONS FOR ALLOWANCE OF WRIT

A. Denial of Right to Speedy Trial

Petitioner asserts that an important question of Constitutional law exists which remains undecided by this Court on the speedy trial issue. This case factually presents a practical application of all of the criteria demanded in Barker v. Wingo, 92 S.Ct. 2182, to determine if the right to a speedy trial has been denied.

That element here present but missing in Barker v. Wingo, is that this Petitioner did assert his right and demand a speedy trial. This Court decided that since Barker had not wanted one, therefore the right had not been abridged. In the opinion Mr. Justice Powell said:

"More important than the

> absence of serious prejudice, is that fact that Barker did not want a speedy trial.****Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges, he definitely did not want to be tried."

In the concurring opinion by Mr. Justice White:

> Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus, it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise. From the Commonwealth's point of view, it is fortunate that the case was set for early trial and that postponements took place only upon formal requests to which Barker had opportunities to object.
>
> Because the Court broadly assays the factors going into constitutional judgments under the speedy trial provision, it is appropriate to emphasize that one of the major purposes of the pro-

> vision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 445, 463, 30 L.Ed. 2d 468 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. * * * ".

The corollary to this would have to be that if Barker had asserted the right then presumably the case would have been decided in his favor.

The unresolved question presented here is if the other Barker factors are present (as more fully hereinafter discussed) and the defendant has not only repeatedly demanded trial, but vigorously opposed each requested prosecution continuance, has he not been denied his Sixth Amendment right?

The four primary factors to be considered are: Accused's assertion of his right, length of the delay, reason for the delay, and prejudice to the accused.

Accused's Assertion of the Right: It is clear and of great importance that Petitioner asserted his right on numerous occasions. This assertion by Petitioner distinguishes this case from the others, and the effect of this has not been decided by this Court.

Length of the Delay: Considering the length of the post-indictment delay: This constituted a period of time from August, 1972, until October, 1974, or 26 months. To this Petitioner, suffering from cancer, the mere passage of time is more real and vital than it might be to a young healthy person who is awaiting trial. If, as the appellate court stated, the only period considered is from the arrest in May, 1973, until October, 1974, then this was 17 months. In any event, the Court of Appeals recognized there was a sufficient delay to "invoke the Barker analysis".

Reason for the Delay: Recognizing the well established principle that the

burden is on the prosecution to provide a speedy trial, and that a defendant is not obligated to get himself to trial, the delays were all government caused. The investigatory part of the case had been completed prior to the indictment. The government had nine months from indictment to arrest to negotiate with Switzerland regarding the deposition, but apparently did not begin to do so until after the Petitioner was arrested. During the entire period of June, 1973, to May, 1974, they were unable to go to trial becuase of breakdowns in negotiations with Switzerland.

Within a matter of a few weeks after arraignment, Petitioner's pre-trial motions were filed, and argued in August of 1973. This did not cause, nor was it designed to cause, any delay whatever. It is to be noted that the government had not even filed with the Court for the Commission to take the deposition until after Petitioner had filed his pre-trial motions. The United States Attorney stated over and over that he could not proceed to trial without the deposition, and it, through absolutely no fault of the Petitioner, was not taken until January 29, 1974. It therefore is quite obvious that Petitioner's pre-trial motions did not delay the trial in any way.

The first three continuances granted to the government from the vacation of the first trial date in July of 1973, until the next to the last trial setting of June 10, 1974, all had to do, in some way, with the inability to either take

the deposition in Switzerland or to get the deponent to sign it when it finally was taken. In fact, the deposition, when it was belatedly returned from Geneva to Denver, was returned unsigned. The government made various representations as to when the deposition could be taken; in July of 1973, it was represented that arrangements could be made, and the deposition taken within about 45 days. This did not come to pass, and in November, 1973, Petitioner filed his first demand for trial. At the hearing the government then represented that the case could be tried in Februrary or March of 1974, but the trial court doubted that, so set the case for trial in April, 1974. With the failure to have the deposition timely returned, and again over objection of Petitioner, the trial was continued from April to June.

The United States, in May, 1974, requested yet another continuance on the grounds that a "key government witness" was pregnant, could not fly from Saigon to Denver, and that without her testimony the case against Petitioner would have to be dismissed. Thus, the case was again continued, this time until October 15, 1974. After this "key witness" had testified at the trial, the trial court vigorously and repeatedly found that her testimony was not essential, and the continuance would not have been granted had the court known what her testimony was going to be. The appellate court appears to agree with the trial court, but ruled that the witness' testimony did not have to be "absolutely essential" to justify the continuance.

Prejudice to the Petitioner: The prejudice referred to is not defined narrowly as only an inability to obtain witnesses because of passage of time or because witnesses memories may be dim. The prejudice referred to is measured in more humane terms. Barker v. Wingo (supra) and Moore v. Arizona, 94 S.Ct. 188, have recognized that the prejudices considered are restraints of liberty, inability to earn a living, public suspicion, and personal anxiety. Both the trial court and appellate court found all these were applicable to this Petitioner, and were evils that should be guarded against.

B. Failure to Prove a Crime.

Petitioner believes that the case of Langer v. United States, 76 F.2d 817, an 8th Circuit case, and the case of Lowe v. United States, 141 F.2d 1005, a 5th Circuit case, are in conflict with the opinion of the 10th Circuit in this case.

In the case at bar, A.I.D., the agency of the United States, was not going to, nor did it loan money to pay Eiffel's claim. The United States was not a party to any contracts regarding the audit of the claim. It did not participate in the audit, nor was it in any way affected by it.

The auditors were employees of and contracted with the sovereign government of South Viet Nam. Hydrotechnic was an employee of and contracted with the sovereign government of South Viet Nam.

Petitioner was an employee of, and on the payroll of Hydrotechnic as he had been for the preceeding six years. The evidence, somehow linking Hay with the United States, was that the cost of the audit, some $30,000, was borne by the United States.

S.M.W.A. furnished vouchers evidencing that cost, which was in part based on vouchers furnished S.M.W.A. by Hydrotechnic. A portion of Hydrotechnic's costs, in turn, was payment to Hay of his salary. Therefore, the 10th Circuit says that a conspiracy to falsify Eiffel documents of a claim to be paid, not by the United States, but by Viet Nam, is a conspiracy against the United States.

By contrast, the 8th Circuit in Langer (supra) involved a situation wherein the Defendant was charged with making a false statement in a matter within the jurisdiction of the United States in that he, an employee of a private corporation, falsely represented to his corporate employer the number of hours he had worked. The company was under a government contract to build ships for the United States, and the contract provided that the United States would reimburse the company for its payroll payments.

The opinion held:

> Accepting the allegations of the indictment as true, appellant's employment was derived from his private contract with a private

corporation. His hours of work and rate of pay, and the control and supervision over the duties he performed, were matters within the exclusive dominion of his private employer. The misrepresentation as to the hours worked was made to an employee of the private corporation under an arrangement whereby the wages were to be paid by the corporation. Insofar as the employee was concerned, every aspect of his employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind. The company's method of merchandising its product and its arrangements with respect to payments for sales made did not effect any change in the relationship existing between the company and appellant as private employer and private employee. The contract for reimbursement of payroll payments, at least so far as the record shows, did not designate the payroll department of the company as an agency of the United States, nor did it place that department under the control or

> supervision of any such agency.

Hay was an employee of Hydrotechnic, and had no connection with the United States insofar as the audit or claim were concerned, except that, ultimately, the United States reimbursed various costs of the audit, which also included Hay's salary. The Lowe case has ruled that this is an insufficient interest of the United States to sustain a criminal conviction.

In this case, no lending function of the United States was in any way impaired, since it was not making any further loan to Viet Nam on account of the water project based on the outcome of the audit, nor for any other reason that involved Hay.

In the 8th Circuit Court of Langer, (supra), the United States, through an agency, loaned money to North Dakota for emergency relief. Defendants planned to compel state employees engaged in distributing the money to contribute five percent of their salaries for the use of the defendants in furthering their own political ambitions. As a result, defendants were charged with conspiracy to interfere with the administration of the Acts of Congress in the use of the relief funds. Defendants were convicted and appealed. In reversing the conviction, the appellate court ruled that

> A conspiracy to assess state employees was not

> an act violative of any federal statutes, and hence, so far as the federal government is concerned, is not criminal. So far as the direct evidence of any plan or conspiracy for the collection of these funds is concerned, it is confined to the assessment of state employees.

The alleged conspiracy of Hay for collection of funds was confined to the funds of Viet Nam, which funds never belonged to the United States, so that the opinion of the 10th Circuit, in finding that Hay's actions similar in substance to the acts of the defendants in Langer were a crime against the United States, conflicts with the Langer decision.

At best, the United States took a paternalistic, advisory interest in suggesting that Viet Nam conduct an audit of Eiffel's claim, but no governmental function of the United States was threatened by the conduct of the audit or payment of monies due or paid as a result of it.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

ALMON, BARSOTTI and
BLANCHARD

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CRIMINAL CASE NO. 72-CR-246
JOHN ROBERT HAY, ROBERT MELLONI, PIERRE VALLEE and THEOPHILE SIAUVE, Defendants.	)	

James L. Treece, United States Attorney, by Richard J. Spelts, Assistant United States Attorney, Denver, Colorado, and James J. Graham and Craig C. Donsanto, of Counsel, Department of Justice, Washinton, D.C. for Plaintiff; Almon and Barsotti by Edward B. Almon, Attorney at Law, Denver, Colorado, for Defendant Hay.

MEMORANDUM OPINION

WINNER, Judge

John Robert Hay, Robert Melloni, Pierre Vallee and Theophile Siauve have been indicted for conspiracy to defraud the United States. Only defendant Robert Hay is a citizen of the United States, and he is the only defendant who has been arrested and arraigned. The case is set for trial on June 10, 1974, and it is now before the Court on cross-motions of the

government and defendant dealing with the admissibility of deposition exhibits which are Swiss bank records and which were the subject of the deposition. The deposition was taken under the provisions of 18 U.S.C. §3491-§3494, and, although the underlying statute was enacted in 1936, no reported case passes on its constitutionality or interprets it.(1) Thus, this is a case of first impression, and it is also a case which involves quite unusual facts and circumstances which have required numerous pretrial hearings, and which necessitate a long opinion in ruling on the motions. The pretrial ruling on the admissibility of the deposition and/or the exhibits has been requested by each of the parties because of the tremendous expense involved in bringing witnesses from all over the world if the case is to be tried, and also because of the government's candid admission that if the exhibits are not received in evidence, it is probable that the prosecution cannot defend against a motion for judgment of acquittal at the close of its case. The difficulty and novelty of the problems presented require a summary of the charges made against Hay, and a statement of the facts leading up to the taking of the deposition. Moreover, it should be men-

(1) The constitutionality of the statute was raised in United States v. Rangel-Perez (1959) C.C. Calif. 179 F. Supp. 619, but the constitutional issue was not reached in the decision because that case was decided on the ground of collateral estoppel to challenge defendant's alienage.

tioned that some of the problems tie directly to delicate diplomatic negotiations now in progress which it is hoped will result in a treaty between Switzerland and the United States setting forth a mutually acceptable and workable agreement between the two nations for ascertainment by the United States government of limited information concerning secret Swiss bank accounts. Other problems result from differences between the judicial systems of Switzerland and the United States, as, for example, the inapplicability of the hearsay rule in Switzerland, and the fact that the right of confrontation of witnesses under the Sixth Amendment has no parallel under Swiss law. The problems are compounded by Swiss laws which prohibit or severly restrict the conduct of foreign judicial proceedings on Swiss soil. In its last analysis, the case presents a situation in which two friendly nations are attempting to mesh their laws and governmental policies and purposes with those of the other, and, as will be seen presently, with the treaty negotiations in mind, the taking of the deposition in question caused the persons involved to walk a tightrope between the differing positions of the two nations.

With this preface, the indictment charging defendants with a conspiracy to defraud the United States was returned August 18, 1972. The government charges that in 1966-1967, Hay was employed by Hydrotechnic Corporation of New York City, and that Hydrotechnic personnel were the consulting engineers on a water system

project in Saigon, South Viet Nam. It is alleged that in 1962, acting through the Agency for International Development (A.I.D.), the United States loaned the government of Viet Nam $19,500,000.00, to assist in financing the project. Construction was accomplished under five contracts, but the indictment has to do with only one of them, a contract for $9,400,000.00, for pre-stressed concrete pipe, awarded to a French corporation, Les Establissements Eiffel. The job was completed in 1966, and Les Establissements Eiffel made claim for a $5,500,000.00 cost overrun. A.I.D., which was contractually liable for overruns, refused to pay without an audit, and Touche, Ross, Bailey and Smart were employed by A.I.D. to perform the audit. The audit was completed in 1967, and a $2,300,000.00 overrun payment was authroized and made to Les Establissements Eiffel. The government contends that this sum was deposited to the French firm's account in the Chase Manhattan Bank on October 2, 1967, and that on the same day $538,000.00 of the deposit was transferred from the Les Establissements Eiffel account to the account of one of its employees, defendant Theophile Siauve. Then, says the government, two transfers were made from Siauve's account to two secret bank accounts in the Union Bank of Switzerland in Geneva. One transfer, in the amount of $125,000.00, was to account No. 480.425 PL and the other in the amount of $408,000.00, went into account No. 580.424 PL.

It is the theory of the United States that Hay conspired with the other three

defendants, all of whom were employees of Les Establissements Eiffel, to defraud the United States, and that the $125,000.00 transfer by Siauve to secret account No. 580.524 PL was a payment to Hay in furtherance of the conspiracy. The government asserts that Hay is the owner of secret account No. 580.425 PL, and, manifestly, proof of that fact is probably crucial to the government's case. Additionally, the government claims that the Swiss bank records will disprove certain statements made by Hay in the course of the investigation concerning the history and source of the secret account.

Not surprisingly, the investigation of this alleged conspiracy extended over a long period of time and into many foreign countries. More than 100 persons were interviewed, and the geographic area of the investigation included Vietnam, Thailand, Canada, France, Switzerland, Iran, Spain, Guam, Laos, Tunisia, and, of course, the United States. The first suggestion that Hay was involved in criminal activity in connection with the cost overrun settlement was received in January, 1969, and this triggered the long investigation. In March, 1972, the Federal Department of Justice and Police of Switzerland arranged to have the Union Bank of Switzerland furnish to the Department of Justice copies of records of secret account No. 580.425 PL, and those records purport to show that the account is in Hay's name. As will be discussed later, this information was acquired by a Swiss Magistrate's search warrant. At

that point in time, the State Department was required to make inquiry as to whether a bank officer would be willing to come to the United States to Testify, and it was learned that the bank would not consent to have a bank officer testify in this country. Negotiations were then commenced to see if agreement could be reached with the Swiss government and with the bank for the taking of a deposition under 18 U.S.C. §3491. In the meantime, a search for Hay was initiated, and in June, 1972, it was learned that he was working in Mali on another A.I.D. project.

In July, 1972, at least a tentative agreement was reached with the Union Bank of Switzerland and the Swiss government to permit an unprecedented deposition in Switzerland under the provisions of 18 U.S.C. §3491. With these preliminaries out of the way, an indictment was presented to and was returned by a grand jury.(2) The indictment was ordered sealed, and efforts were made to persuade Hay to return to the United States from Mali under pretext of need for consultation with A.I.D. officials on the Mali project. Hay declined all invitations to return, and he could not be extradited because there is no extradition treaty between Mali and the United States. The State

(2) Venue lies in Colorado because the last known residence of Hay, the only citizen of the United States charged, was in Colorado Springs, Colorado, and Hay was in Mali when the indictment was returned. See, 18 U.S.C. §3238.

Department informally agreed with the government of Mali to have Hay declared persona non grata, and Mali cancelled his visa. The Mali police saw to his boarding of a plane for Dakar, Senegal, where he boarded another plane destined for New York City. By singular coincidence, United States Marshals were also aboard, and Hay was arrested as the plane started to land in New York. He appeared before a Magistrate in New York City, and was brought to Denver, where he again appeared before a Magistrate in advance of his June 1, 1973, arraignment.

Numerous motions have been filed and argued, and Hay has pressed his Sixth Amendment rights to a speedy trial. He has demanded that the indictment be dismissed because of claimed violation of those rights, and I have ruled that because of the unusual nature of the case, the indictment should not be dismissed because, as will be discussed presently, the government has done nothing to intentionally delay the case, or to take advantage of Hay, and it has done all that can be reasonably required of it to push the case to trial.

Nothing I might say would add to the abundant appellate case law on defendant's Sixth Amendment right to a speedy trial. As to pre-indictment delay, I have studied United States v. Marion (1971) 404 U.S. 307, Barker v. Wingo, 407 U.S. 514, United States v. Beitscher (1972) 10 Cir. 467 F. 2d 269, United States v. Merrick (1972)10 Cir. 464 F. 2d 1087, and many other cases. Applying the tests outlined in Barker,

the pre-indictment delay was long, but the reasons for the delay are understandable and justifiable. The defendant has pressed his claim for dismissal because of pre-indictment delay, but his showing of prejudice from the delay is minimal, and no deprivation of either Fifth or Sixth Amendment rights has been established.

The post-indictment delay presents a separate question. Defendant has pressed for trial, and he has shown that his ability to earn a living has been impaired -- especially in light of the fact that he is customarily employed in far distant countries, and his passport has been lifted. He has not shown that his ability to defend against the charges made is lessened because of the delay, and certainly there is no suggestion that the government has done anything other than to strive mightily to take the essential Swiss deposition at the earliest possible time -- a chronology which will be related in a moment. Applying the balancing tests of Barker v. Wingo (1972) 407 U.S. 514, which were recognized in United States v. Merrick (1972) 10 Cir. 464 F. 2d 1087, I have heretofore denied defendant's motions to dismiss because of alleged delay. As was said in Barker, the "peculiar circumstances of the case" are relevant and important, and "delay which can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge," and the conspiracy charge here is serious and most complex. The post-indictment delay here is a bit shorter than the post-

indictment delay here is a bit shorter than the post-arrest delay upheld in United States v. Singleton (1972) 2 Cir. 460 F. 2d 1148, and the justification for the delay here is to me much greater than the justification in Singleton. It is for these reasons that I have held and I again hold that delay has deprived defendant of no constitutional right under the facts and circumstances of this case. Hay's renewed motions to dismiss because of trial delay are denied.

Hay's first assorted motions directed to the indictment were filed, briefed, orally argued and ruled on promptly, and the question of the Swiss deposition was first raised by motion for the issuance of a commission pursuant to 18 U.S.C. §3491 et seq., filed June 29, 1973. The request of the government for the issuance of a commission was opposed by defendant in a brief filed August 3, 1973, and the government replied August 22, 1973. Oral argument was had August 23, 1973, with rulings being made on all then pending motions, including a ruling that the requested commission should issue. A formal order was prepared and signed September 14, 1973, and the delay in the preparation of the written order stemmed from the Court's concern over defendant's right to confront witnesses testifying against him. To meet this difficult problem, it took time to obtain Justice Department agreement that the government would pay the way of defendant and defense counsel to Switzerland. Additionally, special arrangements had to be made with the State Department for the issuance of

a temporary restricted passport to defendant. Defendant was given the choice of going to Switzerland at the government's expense or waiving his right to attend the deposition, and on September 19, 1973, he elected to attend the deposition. His written election said in material part "that he and his American counsel intend to be present at the execution of this Commission, and by oral interrogatories, cross-examine the witness."

The machinery to take the deposition was then put in motion, but it was not until November 29, 1973, that the Court was advised by S. Richard Rand, American Consul in Bern, Switzerland, that he had received the commission, and that:

> "Although a U.S. consular officer is generally prohibited by Swiss regulations from personally taking depositions in Switzerland, we are actively pursuing with the appropriate Swiss officials the possibility of being granted a special permission in the matter of U.S.A. v. John Robert Hay, et al. I regret the unavoidable delay in acceding to the Court's request in this regard. I will inform you further immediately upon a decision from the Swiss authorities.

The day following receipt of this

letter, another hearing was held. At it, I advised the government that the matter would not be permitted to simply hang-fire indefinitely and that a deadline would have to be fixed within which the deposition would have to be taken or the government would be required to go to trial without it. A February, 1974, deadline for the deposition was suggested. On December 10, 1973, a letter was received from the Department of Justice, and that letter said in material part:

> "As you know, this commission was issued pursuant to the provisions of 18 U.S.C. 3491 et seq. at the request of the Government for the limited purpose of taking the deposition of an officer of the aforesaid Swiss bank to authenticate records which it had previously furnished this Department through the auspices of the Swiss Courts in response to a request for international judicial assistance for use in the prosecution of the above captioned case.
>
> According to the telegraphic response from our Embassy in Switzerland, neither the Federal Department of Justice and Police nor the Union Bank of Switzerland, have any objections to the execution of the commission according

> to its terms, including the right of the defendant, John Hay, to be present at the time with counsel of his choosing and interpose oral cross-examination limited in scope to the issues of the authenticity of the subject bank records, the manner of their preparation, and the qualifications of the bank officer deposed to testify concerning these facts."

The letter then explained that Thomas Egger, a fonde de pouvoir of the bank, would be the witness, and the week of February 11, 1974, was suggested as an appropriate time for the deposition to be taken at the bank's offices in Geneva. Prohibitions under Swiss law against having a United States Marshal accompany Hay to Switzerland were discussed in the letter, and the mechanics of obtaining the limited and restricted passport for Hay were outlined. The letter explained that the State Department had worked out an agreement with Swiss officials which would prevent Hay from crossing any Swiss frontiers under the restricted passport, except, of course, for a return crossing on a nonstop flight destined for the United States. An appropriate order followed on January 4, 1974, which amended the conditions of Hay's bond to allow his trip to Switzerland under the restricted passport, and all of the details of the restricted passport were worked out with

the State Department.

Two weeks later, Hay changed his mind and decided he didn't want to go to Switzerland. In open court, he orally waived his right to attend, and he signed a written waiver of his right to be present at the deposition in which he said:

> "(He expressly waived) the opportunity to be personally present and confront the witness at said deposition as well as personally and orally cross-examine said witness on the record; provided, however, he understands that his American counsel will personally attend said deposition and represent him pursuant to the terms of the Commission."

By letter of January 18, 1974, and by telegram of January 25, 1974, the deposition was set for January 29, 1974, at the bank's offices in Geneva, all of which sets the stage for the somewhat remarkable events which occurred in Geneva, commencing on January 29th. On that agreed date, at the offices of the Union Bank of Switzerland, in addition to the shorthand reporter, these persons met:

> Edward Almon, attorney for the defendant Hay.
> Richard J. Spelts, Assistant U.S. Attorney.
> Thomas F. Egger, Vice-President,

Union Bank of Switzerland,
the witness.
Francois Rais, the bank's
lawyer.
S. Richard Rand, U.S. Con-
sul, Bern, Switzerland,
to whom the commission
was issued.

Things didn't go too smoothly that day. Mr. Egger was worried that he might violate Swiss law if he testified, and he thought that any claimed need for the deposition was an absurdity. Putting oneself in his shoes, Mr. Egger's views are completely understandable and logical. The deposition was scheduled to authenticate bank documents, but they had already been authenticated under Swiss law. That authentication took place on March 8, 1972, when Magistrate Foex executed a search warrant concerning secret account No. 580.425 PL. (It will be remembered that this authentication had been arranged through agreement of the Department of Justice with the Federal Department of Justice and Police, and it was through this examination that the government first obtained copies of the Swiss bank documents.) The Swiss Magistrate's authentication was ex parte, but it satisfied all of the requirements of Swiss law, and Mr. Egger thought that the law of the United States was a little silly if it refused to receive hearsay evidence and if it demanded any right of confrontation and cross-examination. That is why, early in the session of January 29th, Mr. Egger explained:

"Such a question is absolutely obvious and that does not have to be proved. On the copy it is stated Geneva, December 2, 1974. When it was made out on the second of December, 1974, and in Geneva. That is on the document. It is an obvious piece. Such authentification, such a question asked to any American bank in the U.S. First National, they will tell you we get documents from the Union Bank all the time. It is Geneva, December 2. As far as our rule, we say those documents are the documents we remitted to the court here in Geneva. That is always the way it was handled. It always was sufficient up to now.

.....

That is where the legislation, the American letislation and Swiss legislation are different. If I admit a document and I admit to its authenticity to the originals we have then the court here believes me. So we say, listen, if our Swiss court believes me, there is no reason the American court

> should not believe it. Some way or another they always found ways in other rogatories we had to have them approved by those terms. All that we say is those are documents authentic to the bank record we have. It was me who made the photocopies, and I remitted the copies to the court here in Switzerland, and the court transmits them over to the United States."

Things went from bad to worse the first day, but government counsel fared worse than did defense counsel because, although the witness would answer no questions posed by the Assistant United States Attorney, Mr. Egger said:

> "As far as the relationship between Mr. Hay's attorney and us, it is a different relationship than the relationship between government officials and us....
> .....
>
> There is one thing to put straight. I say I agree to answer questions to Mr. Almon. I don't agree to answer questions as a witness in front of everybody. I don't agree at all to going into cross examination. That was refused from the

> very beginning. So any questions Mr. Almon could have would be questions he asked us in another meeting we have due to his right as representative of our client. But no questioning me as a witness because we do not witness as such."

It occurs to me that defense counsel never had it so good. The government's witness was willing to disgorge everything he knew to defense counsel, but he wouldn't talk to government counsel. From aught that appears in the record, this invitation to visit defense counsel's Valhalla was not accepted, and with reiteration by Mr. Egger that he wouldn't be cross-examined, over defense counsel's objection, the deposition was recessed to permit consultation between the Department of State and the Swiss Department of Justice and Police.

At 4:30 p.m. that same afternoon, Mr. Almon, Mr. Spelts and Consul Rand met in the lobby of the bank where Mr. Spelts remained. The other two went to Mr. Egger's offices, but there had been a misunderstanding, and Mr. Egger was not available. The group disbanded at 5:00 p.m. to reconvene at 10:00 a.m. the following day.

It did, and on the morning of January 30, Mr. Almon, Mr. Egger, Mr. Rais, Consul Rand and Jean-Louis Bryand, Inspector Principal de la Police de Surete, Geneva, met in a bank conference foom. Mr. Spelts was requested to remain in the bank lobby,

and he did. By addendum to the deposition record made in the bank lobby after the deposition was concluded it is learned from a statement made by Mr. Spelts:

> "I would merely like the record to reflect that on Tuesday, January 29, 1974, I was present as the proceedings began in the bank offices. That Tuesday afternoon I was advised by Mr. Rand to again be at the bank at approximately 4:30 p.m. I was further advised by Mr. Rand that, after diplomatic contact, he had learned the bank would not go ahead with the proceedings at all if (1) the Assistant United States Attorney were present and ask(ed) questions either directly of the witness or through Mr. Rand, (2) that if the Assistant United States Attorney were even present, and (3) if questions the bank did not intend to answer were even asked of the bank on the record.
>
> "I was further advised that for each group of documents mentioned in the written interrogatories of the United States the bank would answer generally only three questions of the United

States, that is (1) describe what the document is, (2) have you compared the document to an original in the bank, and (3) is the document a true and exact copy of the bank original.

"Then, on Tuesday, January 29, 1974, I consulted with John Keeney, Deputy Assistant Attorney General of the United States Department of Justice, Washington, D.C., and thereafter, on behalf of the United States, I requested that Mr. Rand consider the possibility of doing the following: (1) propound on behalf of the United States the three questions regarding each category of documents, (2) regarding Exhibit U.B.S. 41 that Mr. Rand ask on behalf of the United States the four questions contained in our written interrogatories, and (3) in view of the limitations placed upon the United States attorney, would you, Mr. Rand, consider asking Mr. Egger to confirm whether he was the same Mr. Egger who appeared before Mr. Foex, Swiss Examining magistrate, on March 8, 1972, turning over the documents to the Swiss Magistrate and, if so, was the record made by the Swiss Magis-

trate of Mr. Egger's testimony true and correct.

"I would also like the record to reflect that at 4:30 p.m., Tuesday, January 29, 1974, we met at the bank with Mr. Rand, the reporter, and the defense attorney, and that since the bank lobby was closing, I waited on the sidewalk outside (in the rain) while the other three went inside the bank pursuant to the arranged appointment. Thereafter, at approximately 5:00 p.m., I again met with the above three people as they exited the bank and was advised the meeting had been re-scheduled for Wednesday morning, January 30, 1974, at 10:00 a.m. Further, that on Wednesday, January 30, 1974, I again met at 9:45 a.m. with Mr. Rand, the reporter, and the defense attorney in the bank lobby where I waited while the above three went to offices elsewhere in the bank to meet with bank officials."

Mr. Spelts' explanatory statement made in the bank lobby after the deposition had been concluded is set forth in full because of an argument by Hay that the deposition should be excluded on the ground that Mr. Rand did not ask all of

the government's written questions attached to the commission. Indeed he did not, but had he insisted on doing so, there would have been no deposition. If anyone was hurt by the omission, it was the government, and rather than criticize, I commend Mr. Rand for the excellent job he did in rolling with the unexpected punch and in accomplishing the clear intent of the Court's commission. It is true that to minor extent he paraphrased some of the written interrogatories, but at no time did he go beyond the scope or the intent of the government's written questions the commission directed him to ask. Certainly, defense counsel has no claim of surprise because of any of the questions asked.

At the outset of the deposition on January 30, 1974, Mr. Egger identified the Proces Verbal de Perquisition certified by Magistrate Foex. (A copy of it and a translation of it had been supplied to Mr. Almon in advance, and a copy was marked and received as Commissioner's Exhibit A.) Mr. Egger was asked "whether you confirm that the information contained therein is true and correct." He replied that the information is correct, and in summary form, that information is that the records of the Swiss Union Bank show as to secret account No. 580.425 PL:

(a) The account was opened September 30, 1967, by John Robert Hay, and a proxy was granted by Hay to his wife. Another proxy was extended by him on March 18, 1968, to Mrs. Therese Prud'homme Hay.

(b) Copies of bank records (Documents 3 through 40) were delivered to the examining magistrate, together with correspondence between the Bank and Hay. (The document numbers of the documents delivered to Magistrate Foex correspond with the deposition exhibit numbers.)

(c) A letter dated April 2, 1970, is a forgery, and the testimony tending to establish that the letter is a forgery is summarized. (This is deposition Exhibit 41.)

There is nothing wrong with the procedure adopted by Consul Rand in connection with Commissioner's Exhibit A, and Mr. Egger said under oath that the information contained in the Magistrate's summary was correct. See, 58 Am. Jur. Witnesses, §§595-596, and A.L.R. Annotations cited; McIntyre v. Reynolds Metals Corp. (1972) 5 Cir. 468 F. 2d 1092, United States v. Boreli (1964) 2 Cir. 336 F. 2d 376, Finnegan v. United States, (1954) 8 Cir. 204 F. 2d 105, and Zimburg v. United States (1944) 1 Cir. 142 F. 2d 132. He was available for questioning by Mr. Almon on this summary of his former testimony, but no questions were asked or attempted to be asked of him as to this exhibit.

With the exception of Exhibits 41 and 42-B, the following typical questions were put by Mr. Rand to Mr. Egger:

1. Are the exhibits true and exact copies of the original records of the Union Bank of Switzerland?

   (He responded that they were.)

2. He was then asked to describe the documents, and he did so.

At the windup of Mr. Rand's questioning, he asked:

> "Mr. Egger, were the documents you have identified as records of the bank made in the regular course of business of the bank at or about the time of the transaction?" An affirmative response was received.

Mr. Egger said that Exhibit 41 is not a part of the bank's records and the government says that it is a forgery which is what Commissioner's Exhibit A shows Mr. Egger told the Swiss Magistrate. Exhibit 42-B purports to be a letter from Hay to the bank, and I shall discuss its admissibility under 28 U.S.C. §1732 separately.

When it came Mr. Almon's turn to orally question Mr. Egger, he at first directed his questions to Mr. Egger through Mr. Rand. This lasted for about a page of the transcript, but from then on Mr. Egger responded directly to Mr. Almon's questions. He did refuse to answer some questions, and illustrative of his position is this comment by Mr. Egger:

> "I won't answer. The Commission was fixed quite clearly to four points, I would say, and this question goes further than what was agreed with the Federal Police."

I agree with the witness. The deposition was for the limited purpose of determining admissibility under 28 U.S.C. §1732, and the refused questions had nothing to do with the authenticity of the documents.(3) Mr. Egger readily conceded that he had no personal knowledge of the factual information reflected on the documents, and he insisted on confining his testimony to the area of authenticity. Mr. Egger refused to answer some questions, but the questions did not deal with authenticity, and most of the refused questions were subject to the objection that the documents speak for themselves.

In holding as I do that there was no impermissible curtailment of defendant's right of cross-examination, I am not unaware of The Ottawa, 3 Wall 268, and its progeny including Alford v. United States (1931) 282 U.S. 687. I know that the right of cross-examination is encom-

(3) It is to be recalled that government counsel was not allowed to be present, and the witness had to make his own objections. I shall discuss the extent of permissible cross-examination later.

passed within the Sixth Amendment right of confrontation. Pointer v. Texas (1965) 380 U.S. 400. I have studied United States v. Jorgenson (1971) 10 Cir. 451 F. 2d 516, where Judge Hill said:

> "The right of confrontation extends to areas of cross-examination. An area which is properly subject to cross-examination cannot be denied the accused. A limitation which prevents cross-examination into an area which is properly subject to cross-examination does constitute reversible error. See, Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 657 (1931). The characteristic feature in this situation is the complete denial of access to an area which is properly the subject of cross-examination; the extent of cross-examination is discretionary with the trial judge. Smith v. Illinois, 390 U.S. 129 (1968). This distinction has long been recognized by this court.
> .....
>
> "The exercise of discretion will not be upset unless it was clearly prejudicial. Whitlock v. United States 429 F. 2d 942 (10th Cir. 1970).

> "It is therefore incumbent on the appellant to show the limitation on cross-examination restricted either (1) his right of cross-examination by showing a denial of cross-examination on an area properly subject to cross-examination, or (2) a prejudicial limitation on the extent of cross-examination."

In holding that the permitted cross-examination was adequate, I hold only that it was adequate to authenticate records under the provisions of 28 U.S.C. §1732 as that section is incorporated in 18 U.S.C. §3492-93. I emphatically do not hold that the cross-examination would satisfy the cross-examination permitted in a deposition taken under 18 U.S.C. §3503.(4) This statement needs to be explained, and the explanation requires a comparison of the statutes and the purposes of depositions taken under the two differenct sections. A deposition taken under 18 U.S.C. §3492-93 is one taken for the limited purpose of authenticating records, while a deposition taken under 18 U.S.C. §3503 is to develop substantive facts concerning the charge --

(4) Davis v. Alaska (1974) ___U.S.___, would come into full play under §3503, but I do not think that case demands that these bank records be excluded when the deposition was under §3492-93.

facts which the witness must know of his own knowledge. Personal knowledge of the witness as to entries contained in business books and records is not required to qualify exhibits for admission into evidence under the language of 28 U.S.C. §1732, and that authentication of records is all which is permitted in 18 U.S.C. §3492-93. 28 U.S.C. §1732 says:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term "business" as used

> in this section, includes business, profession, occupation, and calling of every kind."

This federal shopbook rule is an outgrowth of the common law which gradually grew to permit hearsay evidence to prove entries in books of account. The statute is a copy of the Model Act for Proof of Business Transactions formulated in 1927, and either it or the Uniform Business Records as Evidence Act agreed upon in 1936 has been adopted by almost every state. An excellent history of shopbook statutes is found in the Advisory Committee note to Rule 803 (6) of the proposed Federal Rules of Evidence, and, in fact, as those rules have been approved by the House (H.R. 5463) 28 U.S.C. §1732 (a) is repealed and the new rule will replace the statute. Rule 803 (6) permits authentication by any witness who has custody, and the required qualifications of the witness to authenticate records are extremely limited. The sole purpose of Mr. Egger's testimony was to authenticate the records. He did so on direct examination. The only questions he refused to answer on cross-examination were not questions which would have rendered the exhibits inadmissible no matter what the answers.(5) It has been said, "Under

(5) A custodian could authenticate computer printouts unintelligible to the witness, and, accordingly, questions to Mr. Egger as to the meaning of record entries could not render the records inadmissible.

the American rule, a witness called merely to identify letters, statements, or other instrument may not be cross-examined regarding other matters in issue in the case." 58 Am. Jur. Witnesses, §637. I do not think that the limitation on cross-examination imposed by Mr. Egger brings the testimony within the tests enunciated in United States v. Jorgenson, supra. Mr. Egger's testimony authenticated the deposition bank record exhibits in accordance with the requirements of 28 U.S.C. §1732, and all deposition exhibits except Exhibit 41 and 42-B have been properly authenticated. See, United States v. Re (1964) 2 Cir. 336 F. 2d 306.

The deposition affirmatively established that Exhibit 41 is not a bank record; and, that being true, it cannot be received under the statute. Exhibit 42-B is a letter purporting to have been received by the bank from defendant Hay. It cannot be said to be a record made by the bank in the ordinary course of business. I acknowledge that there are cases which permit the introduction of received correspondence under 18 U.S.C. §1732, but there are cases which hold to the contrary. Edwards v. United States (1967) 10 Cir. 374 F. 2d 24, Bisno v. United States (1961) 9 Cir. 299 F. 2d 711, United States v. Kelly (1965) 2 Cir. 349 F. 2d 720, Phillips v. United States (1966) 9 Cir. 356 F. 2d 297, United States v. Sherfey (1967) 6 Cir. 384 F. 2d 786, Hussein v. Isthmian Lines, Inc. (1968) 5 Cir. 405 F. 2d 946, and Otney v. United States (1965) 10 Cir. 340 F. 2d 696. 28 U.S.C. §1732 does not make

admissible everything stowed in a business file, and I do not think that it can be received under §1732.

The determinations made thus far meet only some of Hay's arguments, and it is necessary to consider his remaining contentions. He says that the statute, i.e. 18 U.S.C. §3492-93, is unconstitutional under the Fifth and Sixth Amendments. I know not what more could have been done to insure Hay's right to confront the witnesses against him, and he surely waived that right. But, says defendant, the jury has a right to see and evaluate Mr. Egger in passing on his credibility. I think that there is no Sixth Amendment right to have a jury confront witnesses, but Hay argues that the right is a Fifth Amendment right as a part of due process of law. This is not the law, because testimony taken outside the presence of the jury has been admitted when the defendant has had confrontation. Mattox v. United States (1895) 156 U.S. 237, Mancusi v. Stubbs (1972) 408 U.S. 204, United States v. Brown (1969) 10 Cir. 411 F. 2d 1134, and Goldsmith v. Cheney (1971) 10 Cir. 447 F. 2d 624.

I find nothing unconsitutional in 18 U.S.C. §3492-93, and, surely, if §3492-93 is subject to constitution attack, 18 U.S.C. §3503 would be unconstitutional. That section permits depositions in criminal cases ranging in scope far beyond mere authentication of records(6). Yet, the

(6) The limited purpose of §3492-93 depositions is spelled out in the legisla-

constitutionality of the 1970 statute, 18 U.S.C. §3503, is upheld in United States v. Singleton (1972) 2 Cir. 460 F. 2d 1148.(7) The tests of California v. Green (1970) 399 U.S. 149, have been established here. Mr. Egger is not subject to service of subpoena, and the government has made a good faith effort to persuade him to come to the United States to testify. He has refused to come, and his unavailability at time of trial is not the government's fault -- indeed, the government would like to have him here. As was said in Singleton:

> "Therefore, as the witness was actually unavailable and the reason for his absence was not attributable to wilful or negligent Government action or omission, the use of his deposition at trial was constitutionally permissible."

The use of the Swiss deposition, or, at least, the exhibits authenticated by it, are constitutionally permissible.

It will be easier to discuss defendant's remaining arguments if 18 U.S.C.

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tive history of the statute.

(7) In a vigourous dissent, Judge Oakes adopts many of the arguments advanced by defendant here, but I agree with the majority, and I too think that California v. Green (1970) 399 U.S. 149 settles the constitutional argument.

§3492-93 are quoted at length at this point. 18 U.S.C. §3492 provides:

> "(a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the requirements of section 1732 of Title 28 are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of records, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the

time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatorees, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party

> whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time."

18 U.S.C. §3493 sets forth procedures to be followed:

> "The consular officer to whom any commission authorized under section 3492 of this title is addressed shall take testimony in accordance with its terms. Every person whose testimony is taken shall be cautioned and sworn to testify the whole truth and carefully examined. His testimony shall be reduced to writing or typewriting by the consular officer taking the testimony, or by some person under his personal supervision, or by the witness himself, in the presence of the consular officer and by no other person, and shall, after it has been reduced to writing or typewriting be subscribed by the witness. Every foreign docu-

> ment, with respect to which testimony is taken, shall be annexed to such testimony and subscribed by each witness who appears for the purpose of establishing the genuineness of such document. When counsel for all the parties attend the examination of any witness whose testimony is to be taken on written interrogatories, they may consent that oral interrogatories in addition to those accompanying the commission may be put to the witness. The consular officer taking any testimony shall require an interpreter to be present when his services are needed or are requested by any party or his attorney."

Most of defendant's remaining arguments are a nit-picking of the statutes, and they ground on the proposition that criminal statutes are to be strictly construed -- within reasonable limits, a truism.

Defendant says that the testimony wasn't taken in accordance with the terms of the commission as is required by §3493. This argument reiterates the complaint that not all of the government's written questions were asked, and I have already disposed of the contention with the com-

ments, (a) if anyone was hurt, it was the government, (b) the spirit of the commission was fully complied with, and (c) Consul Rand had no choice, and he must be found to have possessed some reasonable discretion to meet unforeseen circumstances as they developed.

§3493 says, "Every person whose testimony is taken shall be cautioned and sworn to testify to the whole truth and carefully examined." Defendant argues that no such caution was given. This oath was taken by the witness:

> "You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.
>
> "Mr. Egger: I do."

The taking of that oath constituted a caution to testify to the whole truth, and the witness swore that he would do so. I can't find any failure to obey this command of the statute.

The statute then says that the testimony shall be reduced to writing, and, "after it has been reduced to writing or typewriting, be subscribed by the witness". Mr. Egger didn't sign the testimony. By certifying affidavit attached to the depo-

sition, Consul Rand tells why:

> "I hereby affirm, that in persuance of that commission, on January 30, 1974, I personally presided over the proceeding whereby Mr. Thomas F. Egger, an officer of the Union Bank of Switzerland, gave oral testimony concerning the authenticity of documents attached as Exhibits to the Commission. A written transcript of Mr. Egger's testimony was prepared by a stenographer under my direct supervision.
>
> "I further affirm that in accordance with instructions of my Commission, I submitted the written transcript to Mr. Thomas Egger for signature through the intermediary of the Swiss Federal Department of Justice and Police as had been previously agreed. The witness' employer, the Union Bank of Switzerland, has refused to permit Mr. Egger to sign the written record of his testimony stating that, although Mr. Egger had been permitted to certify orally that

certain of the bank documents were exact and authentic, it feared that subscribing the testimony would be considered in derogation of Swiss law. Although the Union Bank of Switzerland was reportedly assured by the Swiss Federal Department of Justice and Police that the act of signing the record would not be a violation of Swiss law, the Bank has persistently refused permission.

"I further affirm that there has never been any question in the Bank's action that the written record submitted was not an exact and correct record of Mr. Egger's testimony. Based upon my personal observation, by my direct supervision of the stenographer in preparing the transcript and a careful review of the final transcript, I hereby affirm that the foregoing transcript is a true and exact record of the testinony of Mr. Thomas Egger, taken in pursuance of my Commission."

This certifying affidavit not only

explains the reasons, but, additionally, there was compliance with 28 U.S.C. §3494. Moreover it is to be remembered that although Mr. Egger thought that Swiss law prohibited his signature on the document, he did sign each of the exhibits as a certifiaction of their authenticity. Additionally, the certifying affidavit of Consul Rand was drafted in strict accordance with the provisions of 22 C.F.R. 92.61 which anticipates a refusal of a witness to sign. That section of the Code of Federal Regulations says that if the witness refuses to sign, the consular officer should explain the reasons for the lack of signature, and that, with his explanation, "the deposition may then be used as though signed by the witness except when, on the motion to suppress, the court holds that the reasons given for the refusal to sign require the rejection of the deposition in whole or in part." I hold that the reasons here given do not require the rejection of the deposition, either in whole or in part. Moreover, 18 U.S.C. §3503 which we have discussed earlier says that depositions in criminal cases taken under that section -- depo tions requiring personal knowledge of the witness -- "shall be taken and filed in the manner provided in civil actions." Rule 30 (e), F.R.C.P. covers the situation where a witness refuses to sign. It say that in such circumstances, "the officer shall sign it and state on the record... the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion

to suppress under Rule 32 (d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part." Once more, the reasons don't require rejection. To say that a deposition taken under 18 U.S.C. §3493-93 is inadmissible if not signed, but a more vital deposition taken under 18 U.S.C. §3503 is admissible even though unsigned would be to place form above substance. The lack of Mr. Egger's signature to the transcript is unfortunate, but it is not fatal.

Defendant says that the conditions of the deposition were oppressive because of the presence of Jean-Louis Bryand. Nothing in the record supports this contention. In fact, it was only after his arrival that there was any deposition. This argument I hold is without merit.

Defendant says that he was prejudiced because questions had to be asked through Consul Rand. In fact, this situation didn't last long, and most of Mr. Almon's questions were responded to by Mr. Egger without having them repeated by Consul Rand. But, even if this were not so, when an interpreter is used, the questions are given to the interpreter to ask of the witness. This inconvenience doesn't invalidate the deposition.

18 U.S.C. §3492 provides:

> "Any book, paper, statement, record, account, writing, or other document, or any portion

thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States shall, when duly certified as provided in section 3494 of this title, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 3492 of this title, that such document (or the original thereof in case such document is a copy) satisfies the requirements of section 1732 of title 28, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to required authentication under the provisions of section 3493 of this title of any such foreign documents which may otherwise

be properly authenticated by law.

I hold that with the exception of Commissioner's Exhibit A, Exhibit 41 and Exhibit 42-B, from all of the testimony taken with respect to the Swiss bank documents pursuant to the commission executed under 18 U.S.C. §3492, the bank records have been authenticated under 28 U.S.C. §1732; that they have been certified in accordance with 18 U.S.C. §3493, and that a prima facie showing has been made which permits reception of the documents into evidence. If defendant so desires, the entire deposition will be received in evidence. If defendant opposes the introduction of the deposition itself, the admissibility of all or part of the deposition will be ruled on at trial. Additionally, I leave for trial determination the government's request that "findings of fact" be made as to the authenticity of the records. If the deposition itself is not read at time of trial, some explanation will have to be made to the jury as to the authentication of the bank records, and, probably, as to the lack of authenticity of Exhibit 41. The nature and extent of the explanation will be decided upon on the basis of the record at trial time. I believe that 28 U.S.C. §1732 can be utilized to prove a negative; i.e., that it can be used to establish that a record is not authentic, and in that connection, I rely on United States v. DeGeorgia (1969) 9 Cir. 420 F. 2d 889, Meeks v. State Farm, (1972) 5 Cir. 460 F. 2d 776, Bowman v. Kaufman (1967) 2 Cir., 387 F. 2d 582, and Imperial Meat Co. v. United States (1963)

10 Cir., 316 F. 2d 435. Just how this should be handled will have to await defendant's decision as to whether he wants the deposition read or not read, and, the ultimate decision as to the proper way to receive the exhibits must await trial for decision at that time based on the evidence as it develops. Additionally, defendant may make particularized objections at time of trial going to competency, relevancy or materiality of any of the exhibits.

Dated at Denver, Colorado, this 30th day of April, 1974.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)No. 75-1044
)
JOHN ROBERT HAY,)
Defendant-Appellant.)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(D. C. No. 72-CR-246)

Edward B. Almon and David Barsotti, Denver, Colorado, for Defendant-Appellant.

Richard Spelts, First Assistant United States Attorney (James L. Treece, United States Attorney; James Graham, Department of Justice, Washington, D. C., on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before HILL, BARRETT and DOYLE, United States Circuit Judges.

HILL, Circuit Judge.

Appellant was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371.[1] Three co-conspirators, Robert Melloni, Pierre Vallee and Theophile Siuave, also were indicted, but were not United States citizens and have not been arrested. The events of the conspiracy and of appellant's arrest and trial were played against an international scenario. Venue was laid in the District of Colorado because it was appellant's last known residence in the United States. In this appeal he argues three grounds for reversal of conviction. Appellant contends (1) that he was denied his right to a speedy trial, (2) that records of his secret Swiss bank account and a deposition taken to authenticate them were improperly admitted as evidence, and (3) that the evidence does not establish a crime against the United States. None of these contentions, in our opinion, warrants reversal of the conviction.

We will first summarize the evidence concerning the alleged conspiracy. In

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[1] In pertinent part § 371 states: "If two or more persons conspire... to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

1960, acting through the Agency for International Development (A.I.D.),[2] which the United States loaned the government of South Vietnam $17,500,000 to help finance a new water system for the city of Saigon. The loan agreement required the creation of a government agency, the Saigon Metropolitan Water Office (Saigon), to supervise the construction and to operate the water system upon completion. The loan agreement gave A.I.D. extensive supervisory powers, including the right of approval of all contractors working on the project. Saigon was obligated to employ an engineering firm to design the water system and supervise its construction. Hydrotechnic Corporation of New York, New York, was selected by Saigon and approved by A.I.D. pursuant to the agreement. From 1961 through 1967, appellant was employed by Hydrotechnic as an engineer on the Saigon project at an average annual salary of $14,000.

A portion of the construction was contracted to a French corporation, Les Establissements Eiffel. Appellant was assigned by Hydrotechnic to supervise this work. Eiffel's contract price was $9,400,000 with the provision for the allowance of additional sums for cost overruns. Eiffel retained work

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[2] The loan was originally made by another agency which was merged into the Agency for International Development. For convenience we have referred to A.I.D. throughout.

worth $4,300,000 and subcontracted the rest. When construction was completed in 1966, Eiffel made claim for a $5,500,000 cost overrun. The government's evidence was that appellant agreed with three co-conspirators, all employees of Eiffel, to exert efforts to obtain the highest possible allowance on Eiffel's claim. During the last quarter of 1966, the conspiracy agreement was reduced to writing. At trial two witnesses testified to the existence and contents of the written agreement. Appellant agreed to approve all documents submitted by Eiffel in support of its claim and to keep co-conspirator Melloni, director of Eiffel's Saigon operation, informed as to the progress of the claim. In return appellant was to receive payment for his services based on the amount of the claim allowed. The invoices submitted to support the claim were falsified by altering invoices from Eiffel's suppliers on other projects to make them appear as expenses on the Saigon project.

When the Eiffel claim was submitted, an audit was required. An accounting firm was hired to conduct the audit and appellant was assigned to assist them with items requiring expertise in engineering. On the basis of the audit, Eiffel was allowed approximately $2,300,000 on its claim. This amount was paid directly by the Vietnamese government because the United States loan funds had already been exhausted.

However, A.I.D. did pay the cost of the audit.

On October 2, 1967, the $2,300,000 was deposited in Eiffel's account at the Chase Manhattan Bank in New York City. On the same day, $538,000 of the deposit was transferred to the Chase Manhattan account of Theophile Siauve, an Eiffel employee and an indicted co-conspirator in this case. Transfers were then made from Siauve's account to two secret accounts in the Union Bank of Switzerland in Geneva. One transfer, in the amount of $125,000, was to account No. 580,425 PL. Appellant was shown to be the owner of this account. This transaction completed the conspiracy.

We now set out the sequence of events relevant to appellant's contention he was denied a speedy trial. The possibility of criminal activity in obtaining the Eiffel cost overrun settlement was first discovered in January, 1969. This triggered a lengthy investigation extending into many foreign countries and encompassing interviews with over 100 persons. The investigation culminated with the confirmation of appellant's Swiss magistrate's search warrant. Because the bank refused to allow its officials to come to the United States and testify at a trial, the State Department had to negotiate with the Swiss government and the bank for the taking of a

deposition under the provisions of 18 U.S.C. § 3491-94.[3] Upon reaching a tentative agreement, the government presented its evidence to a grand jury which returned an indictment on August 18, 1972.

In June, 1972, the government had learned of appellant's presence in Mali, Africa, where he was working on another A.I.D. project. Because the United States has no extradition treaty with Mali, appellant was able to remain there for nine months after his indictment. He declined invitations from A.I.D. to return to the United States under the pretext of consultation about the Mali project. Finally, the State Department was able to negotiate an informal agreement with the government of Mali to have appellant declared persona non grata. Mali revoked his visa and its police shepherded him aboard a plane. As appellant's plane was about to land in New York, he was arrested by United States marshals who were conveniently aboard.

We consider the period of time from appellant's arrest on May 18, 1973, to his trial on October 13, 1974, the relevant period for determining whether his right to a speedy trial has been

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[3] These sections authorize the taking of depositions in criminal cases to authenticate foreign documents and provide the procedure for taking the deposition.

denied. We do not include the time from appellant's indictment to his arrest because appellant was not available for prosecution and because none of the interests protected by the sixth amendment guarantee were endangered during this time.[4] The constitution does not set a specific time limit for criminal trials; whether a defendant has been denied a speedy trial depends on the circumstances of the case.[5] In making the determination, the Supreme Court has suggested four primary factors be considered: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972).

We consider the 17 months from arrest to trial sufficient to invoke the Barker analysis. In this complex case, however, we do not believe the

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4/ In this case the indictment was ordered sealed. Appellant was subject to neither restrainst on his liberty nor public accusation before his arrest. See United States v. Marion, 404 U.S. 307 (1971).

5/ Barker v. Wingo, 407 U.S. 514 (1972); United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972), cert. denied, 407 U.S. 1023.

time lapse is long enough to weigh heavily in appellant's favor.[6] The record shows appellant steadfastly asserted his right to a speedy trial and that must be considered more strongly in his favor. Although these factors are worthy considerations, they are not dispositive. Whether appellant's right has been violated in this case depends primarily on balancing the reasons for delay against the prejudice to appellant.

Different reasons are given for two identifiable periods of delay. The first delay was initiated by the government's motion for the issuance of a commission to take a deposition in Switzerland to authenticate records of appellant's bank account. The second delay was to allow the government to obtain a witness who was unavailable for an earlier trial date.

Delay caused by the Swiss deposition procedure ultimately resulted in continuance of the trial to June 10, 1974--approximately 13 months after appellant's arrest. Appellant's claim a continuance to that date would deprive him of a speedy trial was considered by the trial court in United States v. Hay, 376 F. Supp. 264 (D. Colo. 1974).

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[6] "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker v. Wingo, 407 U.S. 514, 531 (1972).

Judge Winner found the circumstances of the case justified the delay. The circumstances were indeed extraordinary and presented both legal and diplomatic problems.

Depositions to authenticate foreign documents, including business records, have long been authorized by 18 U.S.C. §§ 3491-94, but such a deposition had never been taken Switzerland and the statutes had never been interpreted in a reported opinion. As a result, unique problems were encountered. Some delay was necessary to protect appellant's right to confront the deposing witness. Although he later declined to attend in person, steps were taken to secure Justice Department payment of the travel expenses to Switzerland for appellant and his counsel and to obtain a special passport for appellant. Because Swiss law severely restricts the conduct of foreign judicial proceedings on Swiss soil, special permission had to be negotiated for the American consul to take the deposition. In addition, bank officials were reluctant to cooperate for fear of violating Swiss bank secrecy laws. Other misunderstandings arose because of differences in the two nations' laws. Swiss law has no counterpart to the right to confront witnesses; it has no hearsay rule and thus does not require the type of business record authentication necessary under American law. These and other problems were manifested when the deposition was finally taken on January 29, 1974. The

witness from the bank refused to answer certain questions and requested the assistant United States attorney be excluded from the proceedings. Additional delay was caused when the witness refused to sign the reporter's transcript of the deposition, and it was later returned to the trial court certified by the American consul, but unsigned by the deponent. The refusal to sign was also due to fear of violating Swiss criminal laws having no American equivalent.

The account we have given is but an outline of the reasons for the delay; it does not detail the extent of the delay attributable to each problem encountered. We should note there is no contention the deposition procedure was not pursued as expeditiously as possible.[7] We also note that some of the delay may be attributed to several pretrial motions filed by appellant.

After the deposition was taken, motions were made by both parties for a pretrial determination of the admissibility of the deposition and bank records as evidence. Appellant's motion for dismissal on speedy trial grounds were heard at the same time.

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[7] Appellant does contend the government had the time and should have made arrangements to take the deposition before he was apprehended. The facts of the matter indicate this clearly was not possible.

The issues were briefed at length, orally argued, and subsequently decided by the court on April 30, 1974. We fully agree with the trial court's decision that delay through June 10, 1974, was justified under the circumstances. In its opinion the court stated: "[Appellant] has not shown that his ability to defend against the charges made is lessened because of the delay, and certainly there is no suggestion that the government has done anything other than to strive mightily to take the essential Swiss deposition at the earliest possible time...." United States v. Hay, supra at 269.

Unfortunately, the delay was compounded by the government's May 2, 1974, motion to continue the June trial date to September 16, 1974. Because appellant's counsel had previous commitments in September, the trial was continued to, and commenced on, October 13, 1974. The reason for the final continuance was the unavailability of a government witness, Mrs. Duong Xuan Lang. She was about eight months pregnant in June, 1974, and unable to travel from her home in South Vietnam. At the hearing on the motion for continuance, the government represented to the court that Lang's testimony was essential and without her the government probably would have to dismiss the case. After heraing Lang's testimony at trial, the court expressed its opinion that her testimony was not essential and its

concern that appellant may have been denied a speedy trial by the government's insistence on obtaining her presence.

We appreciate the trial court's concern over the final continuance when the witness sought did not turn out to be essential. We do not believe, however, that a witness must be absolutely indispensable to justify reasonable delay. Rather, this is another aspect of the balancing test and the delay must be commensurate with the relative importance of the witness.[8/] In Barker v. Wingo, supra at 531, the Court simply stated, "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." In Whitlock v. United States, 429 F.2d 942, 945 (10th Cir. 1970), this court held the government's inability to locate a "necessary witness" justified delay that was not "unreasonably long." The District of Colorado Plan for Achieving Prompt Disposition of Criminal Cases, adopted pursuant to F.R. Crim, P. 50(b),

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8/ Although we believe this to be the correct constitutional approach, the new Speedy Trial Act, 18 U.S.C. § 3161 et seq (88 Stat. 2076-89), may be more stringent. Section 3161(h)(3)(A) provides that in computing the time within which the trial must commence, the court may exclude: "Any period of delay resulting from the absence or unavailability of the defendant or an essential witness" (emphasis added).

provides that in extending the time limit for trial set in the plan, the court may consider: "The period of delay resulting from a continuance granted at the request of the prosecuting attorney if: (1) the continuance is granted because of the unavailability of evidence material to the government's case...."

Under these statements of the rule, Lang's testimony could justify some delay, albeit less than would be justified had the government's ill-advised representations been borne out at trial. Her testimony was certainly "material to the government's case." She was co-conspirator Melloni's personal secretary at Eiffel's Saigon office and was head of all secretaries there. She typed all "confidential communications" relating to the alleged conspiracy, including the written agreement with appellant. She testified to the contents of the agreement at trial. Lang's office was next to Melloni's so that appellant had to pass her desk whenever he came to confer with Melloni. Lang directly participated in the altering of invoices submitted to verify Eiffel's cost overrun claim. At trial several exhibits were introduced through her foundation testimony. She was able to identify code names used in communications relating to the conspriacy, including the use of the code name "Fernand" for appellant.

In addition to the substance of Lang's testimony, the nature of the rest

of the government's case must be considered. None of the key government witnesses were residents of the United States. Most of them had to testify through interpreters, and many had been involved in criminal activity themselves. The government could not be certain in advance which witnesses would attend or what credibility the jury would give their testimony. We are convinced the government discharged its "constitutional duty to make a diligent, good-faith effort" to bring appellant to trial. Moore v. Arizona, 414 U.S. 25, 26 (1973); Smith v. Hooey, 393 U.S. 374, 383 (1969).

In reaching this conclusion we are not unmindful that appellant has suffered prejudice and that the ultimate responsibility for providing a speedy trial rests with the government. Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, supra. The prejudice shown by appellant, in addition to the anxiety and concern usually attendant to pending criminal charges, is that he was unable to pursue his occupation as an engineer because that required him to work overseas. The terms of his bond restricted him to Colorado and his passport had been lifted. Preventing this harm is a primary concern of the speedy trial guarantee, Moore v. Arizona, 414 U.S. 25 (1973); Barker v. Wingo, supra, but it is not as important a consideration as impairment of the defense function. United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974); United States v.DeTienne,

468 F.2d 151 (7th Cir. 1972), cert. denied, 410 U.S. 911. The test for determining when the right to a speedy trial has been violated is a balancing test and we believe the prejudice to appellant is outweighed by other factors.

Appellant's hardship diminishes in significance when placed in the context of the entire time expended in this prosecution. He engaged in a clever international conspiracy which took years to discover and investigate. When an indictment was returned, nearly five years after the crime, appellant remained out of the country and beyond prosecution for another nine months. Of the 17 months from arrest to trial, only three months were not absolutely essential to the preparation of the case for trial.[9/] Even this final delay was not without good reason. Delay of this length is never desirable, but it is sometimes unavoidable. As noted 70 years ago by the Supreme Court: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public

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9/ The delay to obtain the government witness totalled four months. Although we do not consider it crucial to the outcome of this case, one month of that delay is attributable to the unavailability of appellant's counsel.

justice." Beavers v. Haubert, 198 U.S. 77, 87 (1905). Under the circumstances of this case, we hold appellant was not denied a speedy trial. We believe this holding is consistent with the rights of appellant and the rights of public justice.

Appellant raises several issues regarding the admission into evidence of the Swiss bank records and the deposition taken to authenticate them. Most of these issues were considered on pretrial motions in United States v. Hay, supra. In view of appellant's testimony at trial, however, it would be fruitless for us to consider these issues on appeal. Even if we could agree with appellant that error had been committed, we would be compelled to hold it was harmless. Any error in admitting evidence is cured by the defendant's admissions concerning the same facts. Weeks v. United States, 313 F.2d 688 (10th Cir. 1963), cert. denied, 373 U.S. 922; United States v. Haili, 443 F.2d 1295 (9th Cir. 1971).10/

10/ In Weeks we held it was harmless error to admit a bank signature card when defendant argued his signature was not adequately proved by the prosecution, but he had later admitted it was his signature on cross-examination.

In Haili defendant argued error in admitting telephone company records to show he made certain phone calls. Any possible error was held harmless because defendant took the stand and admitted

Every issue raised by appellant relates to either the authenticity of the bank records or the reliability of the testimony in the deposition taken to establish their authenticity. In his testimony on direct and cross-examination appellant not only admitted the authenticity of the bank records but also confirmed their accuracy.

> Q. Now, Mr. Hay, did you during the month, either late in September or early October of 1967, open a bank account at the Union Bank of Switzerland?
> A. Yes.
> Q. And did Melloni deposit or cause to be deposited in that account the sum of $125,000?
> A. Yes, he did.
> ....
> Q. I'm going to...direct your attention to the signature card of the Union Bank of Switzerland dated September 20, 1967, and where the name John Robert Hay appears in handwriting that's your signature, isn't it?
> A. Yes, it is.

Appellant did not deny the existence of the account. In his defense he gave

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making and receiving the calls in question. See Beatty v. United States, 357 F.2d 19 (10th Cir. 1966); United States v. Smith, 470 F.2d 377 (D.C. Cir. 1972); Ortiz-Jiminez v. United States, 393 F.2d 720 (9th Cir. 1968).

an alternative explanation of the source of the money and denied it was a payment in furtherance of the conspiracy. His admissions, however, have undermined any claim that he was prejudiced by the evidentiary use of the bank records or the deposition authenticating them.

Finally, appellant argues the evidence did not prove a crime against the United States. He claims the fraud, if any, was on the South Vietnamese government. In support of his contention, appellant emphasizes that the cost overrun claim was paid entirely by South Vietnam because the United States loan funds had been exhausted. Thus, he concludes whatever function the United States had in the loan transaction was already completed. We think the evidence shows a violation of the statute.

In interpreting the statute that is now 18 U.S.C. § 371, the Supreme Court established that: "[I]t is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." Haas v. Henkel, 216 U.S. 462, 479 (1910); accord, Dennis v. United States, 384 U.S. 855 (1966); United States v. Johnson, 383 U.S. 169 (1966).

The United States clearly had a lawful function in connection with the

Eiffel cost overrun claim. The United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste. See United States v. Thompson, 366 F.2d 167 (6th Cir. 1966), cert. denied, 386 U.S. 945. Pursuant to this interest the United States retained extensive supervisory powers in the loan agreement. Through A.I.D. it had the right of approval of the Eiffel cost overrun settlement. The United States paid for the audit and it had a right to have the audit conducted free from fraud. The United States was exercising a lawful government function and appellant's conduct was "calculated to obstruct or impair its efficiency and destroy the value of its operations." Haas v. Henkel, supra at 479. This is fraud on the United States under 18 U.S.C. § 371 as charged in the indictment.

We have considered each of appellant's contentions and find none that warrant reversal of his conviction.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN [illegible] HAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1070

JOHN ROBERT HAY, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-19) is reported at 527 F.2d 990. The opinion of the district court (Pet. App. A-1 to A-43) is reported at 376 F. Supp. 264.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1975. The petition for a writ of certiorari was filed on January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial, in violation of the Sixth Amendment.

2. Whether the evidence showed that petitioner committed a crime against the United States.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371.[1] He was sentenced to three years' imprisonment and a $10,000 fine. The court of appeals affirmed.

As summarized by the court of appeals (Pet. App. B-2 to B-5), the evidence showed that in return for a payment of $125,000, petitioner conspired to defraud his immediate employer and the United States by approving the fraudulently-inflated cost claims of a foreign subcontracting firm employed on a construction project financed by the United States.

Through the Agency for International Development ("A.I.D."), the United States loaned the Republic of Vietnam $17.5 million to help finance a new water system for the Saigon metropolitan area. The loan agreement gave that agency extensive supervisory power over the project, including the right to approve all contractors and all cost-overrun settlements. From 1961 through 1967, petitioner was employed by the American general contractor, Hydrotechnic Corporation, as an engineer on this project (Pet. App. B-3, B-19).

Hydrotechnic subcontracted a portion of the construction to a French corporation, Les Etablissements Eiffel, and assigned petitioner to supervise Eiffel's operations. The three other indicted coconspirators were employees of Eiffel (Pet. App. B-3 to B-4).

When construction of the project was completed in 1966, Eiffel submitted a fraudulent claim for a purported

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[1]Three coconspirators have been indicted, but are not United States citizens and have not been arrested (Pet. App. B-2).

$5.5 million cost overrun to Hydrotechnic. Petitioner and the three Eiffel employees had agreed in writing to attempt to obtain an inflated allowance on this claim (Pet. App. B-4). Petitioner agreed to approve all documents submitted by Eiffel to substantiate its claim and to inform indicted coconspirator Melloni, director of Eiffel's Saigon operations, of the progress of the claim. In return, petitioner was to receive payment based upon the amount of the claim eventually allowed (*ibid.*).

In support of this plan, the invoices submitted to document the claim were altered to make Eiffel's expenses on other contracts appear as charges against the United States-financed project (*ibid.*). Government witness Duong Xuan Lang, Melloni's personal secretary, testified that she typed all confidential documents relating to the fraudulent scheme, including the agreement among the conspirators, and participated in the alteration of the invoices submitted to verify Eiffel's claimed cost overruns (Pet. App. B-13).

After the Eiffel claim had been submitted, the South Vietnamese government hired an accounting firm at A.I.D. expense to verify the cost figures. Petitioner was assigned to assist the auditors with those items requiring application of engineering expertise. On the basis of that audit, an arbitration panel consisting of coconspirator Melloni and representatives of the Vietnamese government and Hydrotechnic allowed Eiffel approximately $2.3 million of its claim (Pet. App. B-4).

The South Vietnamese government paid this obligation directly because the United States' loan funds had by then been exhausted. On October 2, 1967, it deposited $2.3 million in Eiffel's account with the Chase Manhattan Bank in New York City. On that day, coconspirator Vallee directed that $538,000 of the deposit be transferred to the Chase Manhattan account of Eiffel employee

Theophile Siauve, another of the indicted coconspirators. Virtually all of those funds were then transferred from Siauve's New York account to two secret accounts in the Union Bank of Geneva, Switzerland (Pet. App. B-5). Of that amount $125,000 was transferred to petitioner's account in that bank (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 14-17) that the 17-month period between his arrest in May 1973 and his trial in October 1974 violated his right to a speedy trial.[2] In *Barker* v. *Wingo*, 407 U.S. 514, 530-533, this Court specified four factors to be considered in determining whether a person has been deprived of this right: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. None of these factors alone, however, is determinative. *Id.* at 533. Thus, that petitioner asserted his right to a speedy trial is not dispositive.

Upon balancing these considerations, the court of appeals correctly determined that the delay here did not violate petitioner's Sixth Amendment right. Petitioner relies primarily upon the length of the delay. But in *Barker*, the Court noted that a greater delay is permissible in a "serious, complex conspiracy charge" than in an ordinary street crime. *Id.* at 531. It is not disputed that this case involved a complex international conspiracy with difficult problems of proof.

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[2]The court of appeals correctly considered only the delay between petitioner's arrest and trial in assessing his speedy trial claim. As petitioner concedes (Pet. 6), he did not even know that he had been indicted until his arrest in May 1973. He was subjected to neither restraint on his liberty nor public accusation before his arrest; therefore, none of his Sixth Amendment interests was implicated during that period. See *United States* v. *Marion*, 404 U.S. 307.

Petitioner also attacks the justification offered by the government for the delay (Pet. 17-19). The court of appeals found that 13 months of the delay were attributable to the necessity of obtaining the deposition of an officer of the Swiss bank to authenticate the records of petitioner's private account, including the $125,000 deposit.[3] Of the remaining four months, three were found attributable to the unavailability of a major government witness and one to the prior commitments of petitioner's counsel (Pet. App. B-15 n. 9).[4]

a. The court of appeals observed (Pet. App. B-9) that the circumstances which surrounded the obtaining of the authenticating deposition under 18 U.S.C. 3491-3494 "were indeed extraordinary and presented both legal and diplomatic problems." The government conducted delicate negotiations through diplomatic channels[5] to arrange a procedure that would allay the bank's fears of violating Swiss law and would accommodate the dif-

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[3]This deposition was necessary so that the records might be admitted into evidence at trial under the Business Records Act, 28 U.S.C. 1732.

[4]The court of appeals properly rejected petitioner's assertion (Pet. 18) that much of the delay was due to the government's failure to negotiate for the taking of the deposition in the period between his indictment and his arrest, finding that under the circumstances of this case, that procedure would have been impossible (Pet. App. B-10 n. 7).

[5]At least part of the delay in the negotiations resulted from the government's attempt to honor petitioner's demand that he be permitted to confront the bank witness in person. After arrangements had been completed to pay the travel expenses of petitioner and his attorney to Switzerland, to provide petitioner a temporary restricted passport, and to prevent him from recrossing the Swiss frontier under that passport without authorization, petitioner waived his right to attend the deposition (Pet. App. B-9; Pet. App. A-9 to A-13).

ferences in the two countries' legal systems.[6] Both courts below found that "[t]here is no suggestion that the government has done anything other than to strive mightily to take the essential Swiss deposition at the earliest possible time * * * " (Pet. App. B-11; Pet. App. A-8).

b. The second period of delay resulted from the inability of an important government witness, Duong Xuan Lang, to travel from South Vietnam to the United States for the scheduled June 1974 trial because she was then eight months pregnant. The prosecution considered Lang an essential witness because, as executive secretary to coconspirator Melloni, she had typed the conspiracy agreement and had considerable knowledge of the activities of the conspirators (Pet. App. B-13). Accordingly, the government moved to continue the trial date until September 1974. Petitioner's counsel had previous commitments in that month, however, and the trial was continued to, and commenced on, October 13, 1974 (*id.* at B-11).

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[6]The court of appeals summarized some of these difficulties as follows (Pet. App. B-9 to B-10):

> Because Swiss law severely restricts the conduct of foreign judicial proceedings on Swiss soil, special permission had to be negotiated for the American consul to take the deposition. In addition, bank officials were reluctant to cooperate for fear of violating Swiss bank secrecy laws. Other misunderstandings arose because of differences in the two nations' laws. Swiss law has no counterpart to the right to confront witnesses; it has no hearsay rule and thus does not require the type of business record authentication necessary under American law. These and other problems were manifested when the deposition was finally taken on January 29, 1974. The witness from the bank refused to answer certain questions and requested the assistant United States attorney be excluded from the proceedings. Additional delay was caused when the witness refused to sign the reporter's transcript of the deposition, * * * due to fear of violating Swiss criminal laws having no American equivalent.

As this Court stated in *Barker* v. *Wingo*, *supra*, 407 U.S. at 531, "a valid reason, such as a missing witness, should serve to justify appropriate delay." Although Lang's testimony may not have been absolutely essential to the government's case, the court of appeals correctly found that her testimony was "certainly 'material to the government's case' " (Pet. App. B-13).

None of the other key government witnesses was a resident of the United States, and most had to testify through interpreters. Many of them also had been involved in prior criminal activities. The court of appeals correctly noted that the government could not predict in advance which witnesses would attend the trial or whether the jury would credit their testimony (Pet. App. B-13 to B-14). Under these circumstances, the trial court was fully justified in delaying the start of the trial for a reasonable time in order to obtain the testimony of this important witness.

Finally, petitioner does not contend, and the record does not show that the delay impaired his ability to present his defense.[7] Although petitioner may have experienced some personal anxiety or inconvenience in pursuing his profession,[8] this element of prejudice is less important in the overall balancing process than the

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[7]Nor was petitioner subjected to oppressive pretrial incarceration. He was in custody for thirteen days after re-entering the United States but ultimately was released on $5,000 bond.

[8]Although petitioner's passport was revoked after his arrest, he does not argue that the revocation was related to the length of the delay or that his passport would have been returned at an earlier date had his trial not been continued.

Petitioner also suggests (Pet. 17) that the length of the delay was prejudicial to him because he was suffering from cancer. But as petitioner himself testified (Tr. VII, 92, 102), he has experienced no further complications from that disease since undergoing operations for removal of a cancerous tumor in 1967 and 1968.

possibility of impairment of the defense. *Barker* v. *Wingo, supra*, 407 U.S. at 532; see, *e.g., United States* v. *DeTienne*, 468 F.2d 151 (C.A. 7), certiorari denied, 410 U.S. 911.

Considering all the circumstances, the court of appeals properly held that the government had discharged its constitutional duty to make a diligent, good-faith effort to bring petitioner to trial. See *Moore* v. *Arizona*, 414 U.S. 25, 26; *Smith* v. *Hooey*, 393 U.S. 374, 383; *Trigg* v. *State of Tennessee*, 507 F.2d 949 (C.A. 6), certiorari denied, 420 U.S. 938; *United States* v. *Joyce*, 499 F.2d 9 (C.A. 7), certiorari denied, 419 U.S. 1031; *United States* v. *Perez*, 489 F.2d 51 (C.A. 5), certiorari denied, 417 U.S. 945.

2. Petitioner also contends (Pet. 20) that the evidence failed to prove a crime against the United States. He argues that no function of the United States government was impeded by payment of the false claim and that the fraud was perpetrated solely on the Republic of Vietnam. He urges that the United States had no more than a paternalistic interest in the project once its loan funds had been exhausted (Pet. 24).

The court of appeals correctly rejected this argument (Pet. App. B-18 to B-19):

> The United States clearly had a lawful function in connection with the Eiffel cost overrun claim. The United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste. See

United States v. *Thompson*, 366 F.2d 167 (6th Cir. 1966), *cert. denied*, 386 U.S. 945. Pursuant to this interest the United States retained extensive supervisory powers in the loan agreement. Through A.I.D. it had the right of approval of the Eiffel cost overrun settlement. The United States paid for the audit and it had a right to have the audit conducted free from fraud. The United States was exercising a lawful government function and appellant's conduct was "calculated to obstruct or impair its efficiency and destroy the value of its operations." *Haas* v. *Henkel*, [216 U.S. 462, 479]. This is fraud on the United States under 18 U.S.C. §371 as charged in the indictment.[9]

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[9]Neither *Lowe* v. *United States*, 141 F.2d 1005 (C.A. 5), nor *Langer* v. *United States*, 76 F.2d 817 (C.A. 8), upon which petitioner relies, conflicts with the decision below. In *Lowe*, the court held that the mere fact that the United States reimbursed an independent contractor for its salary expenses did not transform a misrepresentation to that company into a matter within the jurisdiction of a federal agency, as required by the statute under which an employee of the company was charged with fraud. There, the subject matter of the alleged fraud was within the exclusive domain of the intermediate company, while in the instant case, the United States retained extensive supervisory power over the completion of the project, including the right to approve payment of cost overruns.

In *Langer*, the court held that an indictment alleging a conspiracy to require employees disbursing federal funds to kickback 5 percent of their salaries to a state political organization charged a conspiracy to defraud the United States. The case was remanded for a new trial, however, on the ground of insufficient evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted t the petition for a writ of certiorari should be denied.

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